Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GERALD L. BRUMLEY PETITIONER

VS.

U. S. DEPARTMENT OF LABOR RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Employees, compensation Act, 5 U.S.C. Section 8101, et, seq. ("FECA"), as amended, precludes judicial review of the decisions of the Secretary of Labor and his/her designees other than in circumstances involving non-citizens of the United States injured outside of the United states?

2. Whether, if Congress did not enact a statutory withdrawal precluding judicial review; codification of the enactments of Congress in such a way as to create an impression of domestic application of withdrawal from judicial review, does in fact constitute a "statutory withdrawal".

3. Whether, if FECA, as amended, does not preclude judicial review of Department of Labor decisions other than as related to non resident noncitizens, the application of withdrawal from judicial review to persons other than noncitizens and judicial treatment of that erroneous codification as "statutory withdrawal", then violates Article 1, Sections 1 and 8 of the Constitution of the United States.

4. Whether the Court of Appeals may premise its decision upon factual issues not reached or fully developed in the District Court about whether or not certain forms should have been completed by Petitioner; while the only issues presented for appeal were purely of a jurisdictional nature, as outlined in questions 1 through 3 above, remained unaddressed by the decision of the Court of Appeals.

5. Whether petitioner's property rights under the Fifth Amendment of the United States Constitution have been abridged.

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Appendix I Text of the floor debate concerning the 1945 amendment, Congressional Record, House, July 19, 1945.

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No. _____

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U. S. DEPARTMENT OF LABOR
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Gerald L. Brumley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit wherein the Court of Appeals rendered opinion about a merit issue, without that issue having been tried and decided in the District Court, despite such merit issue not having been presented on appeal, and despite Petitioner's insistence that the only issue being presented to the Eighth Circuit was the issue of existence or non existence of subject matter jurisdiction; which question turned on the existence or non existence of a valid statutory withdrawal of judicial review, and the existence or non existence of a clear statutory mandate

in the Privacy Act which would bestow jurisdiction even if statutory withdrawal were found to exist. Those appealed jurisdictional questions were not addressed in any way by the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was entered on June 16, 1994 and is reported as *Gerald L Brumley v. United States Department of Labor*, 28 F.3d 746 (8th Cir. 1994) reh. den., Aug. 2, 1994, and appears in Appendix A to this petition. The opinion of the District Court for the Eastern District of Arkansas is captioned in the same way, and is reported at 827 F. Supp. 1409 (E.D. Ark. 1993) and appears as Appendix B to this petition. There was no administrative decisions involved, as the action in the District Court was brought because of the U.S. Department of Labor's failure to act or explain its reasons for not acting on an application submitted to it.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on June 16, 1994. A timely Petition for Rehearing was filed on July 13, 1994. The Court of Appeals' denial of the Petition for Rehearing was issued on August 2, 1994 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1). An enlargement of time in which to file this petition, to November 10, 1994 was granted by Mr. Justice Thomas on October 27, 1994 and is set forth in Appendix D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Sections 1 and 8, Constitution of the United States, which are excerpted in pertinent part as Appendix E.

2. The Fifth Amendment to the Constitution of the United States. which is excerpted in pertinent part as Appendix F.

3. Federal Employees' Compensation Act, Public Law 64-266, 39 Stat 742; quoted in its entirety as Appendix G.

4. The 1945 amendment to the Federal Employees' Compensation Act, Public Law 79-161, 59 Stat. 503; quoted in its entirety as Appendix H; particularly Section 4 thereof. The floor debate from Congressional Record, House, July 19, 1945 at pages 7815 to 7817 underlying that enactment is germane, and is quoted in its entirety as Appendix I.

5. The Federal Employees Act codification at 5 U.S.C. § 8101, et seq, particularly § 8128(b) thereof which is excerpted as Appendix J.

STATEMENT OF CASE

As a threshold matter, and for purposes of clarification to the Court, of the relief sought, Petitioner does not challenge and does, in fact, concede that it is settled law that the Congress of the United States has a right to specify or withhold, or withdraw availability of judicial review, for the actions of administrative agencies. Furthermore, this Petition does not challenge the fact that the codification of the Federal Employees'

Compensation Act ("FECA") at 5 U.S.C. §8128(b) has been interpreted as a statutory preclusion of judicial review. Petitioner contends, however, that what is reflected by that codification is not what Congress enacted. In the original FECA (P.L. 64-266, 39 Stat 742, Sept 7, 1916) there is no preclusion of judicial review. Congress has never, in any subsequent amendment to the FECA enacted a preclusion of judicial review applicable to the general population of FECA claimants. The one and only amendment which has any preclusion of judicial review language whatsoever in it, is Public Law 79-161, 59 Stat 503, July 28, 1945. That amendment was an amendment to extend the coverage of the FECA to certain noncitizens of the United States injured in the course of federal employment on foreign soil, wherein, Congress allowed the administrators of the Act authority to deviate from the prescribed FECA compensation formulas (when compensating such injured noncitizens injured overseas, and that in doing so, the decision those administrators made in such deviations, would be final and conclusive and exempt from judicial review). Through codification error, the impression has been left that there was a generalized legislative statutory withdrawal of judicial review applicable to all FECA claimants. The fact is, that Congress never enacted any such thing.

The legislative history is clear, that the entirety of section 4 of the amending Act (P.L. 79-161) was to be applicable only to such noncitizens injured on foreign soil, and no one else. The original Act is appended hereto as Appendix "A". The legislative history of the amending Act providing the deviation latitude and the finality and immunity from judicial review pertaining to the exercise of that special authority, is appended hereto as Appendix "B". The Amending Act as set forth in the Statutes at large is quoted in Appendix "C".

Petitioner brought a law suit in the District Court of the Eastern District of Arkansas praying that Court to compel the performance of a mere ministerial duty unlawfully withheld and unreasonably delayed. The District Court did not reach the merit of that suit, deciding instead that it lacked jurisdiction to consider the matter. Since the merit controversy was not decided by the District Court, the merit issues were not appealed to the Court of Appeals. What was appealed to the Court of Appeals was the correctness or incorrectness of the District Court's holding of lack of jurisdiction.

Petitioner had raised an additional appeal issue as well, alleging that even if, *arguendo*, there were a statutory withdrawal of judicial review, it would have been overcome by a violation of the clear statutory mandate of the Privacy Act which prohibits any agency collecting and keeping in its files, any information not in furtherance of a statutorily assigned or Presidential Executive Order assigned program activity. Thus, in the absence of any authority to collect earnings reports from persons in Petitioner's category, or to make wage earning capacity determinations concerning them, the Department of Labor is specifically prohibited by the Privacy Act from engaging in such activities *ultra vires* such authority limitation. Petitioner moved in District Court for declaratory judgment that the Secretary of Labor and his /her designees was without authority to require earnings reports from, or make wage earnings capacity determinations pertaining to total disability compensation recipients and the District Court entered a declaratory finding of the Secretary not having such authority. But, subsequently the District Court ruled that it lacked subject matter jurisdiction to have considered that question.

Petitioner did not appeal the issue of the Secretary's authority to require earnings reports, or any

other merit issue that had been in controversy at the District Court level, and instead Petitioner limited his appeal to the correctness or incorrectness of the District Court's determination that there was a statutory withdrawal of judicial review, which barred judicial review; and that there was an absence of any violation of a clear statutory mandate. Petitioner asserted that such clear statutory mandate existed in the Privacy Act (5 U.S.C. §552a(e)(1)), and that there is no actual statutory withdrawal in the first place.

The Court of Appeals did not address appealed issues at all, but rather, asserted the unexceptional but irrelevant fact that FECA itself does not prohibit such gathering of data. The Court of Appeals did not address Petitioner's contention that the Privacy Act does prohibit such gathering of data. The Court of Appeals simply finessed the issue.

The merit issue controverted between Petitioner and Respondent; as to whether Respondent has or has not illegally withheld a ministerial duty due Petitioner, is not before this Court, nor was it properly before the Court of Appeals, because it was not reached by the District Court, and said issue has not been fully developed and determined by a trier of fact in such District Court.

The merit of respondent's diversionary tactic of alleging some lack of information it is allegedly entitled to on certain forms is not before this Court, and was not properly before the Court of Appeals, (although the Court of Appeals made that the determinative factor in its decision, without the issue having been fully developed and tried before a fact finder in the District Court).

There is no claim here by Petitioner that there is a violation of a clear statutory mandate encompassed in the FECA itself, nor was any such claim asserted to the

Eighth Circuit, although the Eighth Circuit generated that issue on its own, and then based its ruling on the indisputable fact that there is no such clear statutory mandate ensconced within the FECA itself.

The issues that were brought on appeal to the Eighth Circuit, and which Petitioner now seeks determination on by this Court, are: (1) is there actually a statutory withdrawal from judicial review pertaining to FECA compensation claimants, other than those non citizens injured on foreign soil to which Publics Law 79-161, Section 4, was addressed by the law makers who enacted it; (2) if there is no actual statutory withdrawal, then did the District Court mistakenly decline jurisdiction on the basis of there being such statutory withdrawal, and was Petitioner thereby improperly deprived of his right to have the District Court try the issue of alleged failure of respondent to perform a ministerial duty; (3) does the Privacy Act prohibition against data gathering and keeping where there is no nexus with an authorized agency activity, in light of both the District Court and the Appeals Court recognizing the absence of any such authorization for the data gathering and utilization activity, constitute a clear statutory mandate which violation of would provide a basis for judicial review even in the face of a valid statutory withdrawal; and (4) did the Eighth Circuit err by failing to even address, much less decide the above three issues which were presented to it on appeal, and reiterated to it on petition for rehearing?

This Petition is made to this Court to resolve these still unaddressed issues.

REASONS WRIT OF CERTIORARI SHOULD BE GRANTED

1. Reviewability of Secretary of Labor's decisions in FECA cases:

The District Court held that the statutory statement of reviewability is a prerequisite. The Eighth Circuit left that holding standing. Such holdings are diametrically opposite of this Court's holdings that judicial review of administrative action is always the rule and non-reviewability the exception which must be demonstrated. *Barlow v. Collins*, 397 U.S. 159 (1970). The District Court holding, embraced by the Eighth Circuit affirmation is contrary to case law from this Court, that only upon a showing of "clear and convincing evidence" should the Courts restrict access to judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); Rust v. Cort, 390 U.S. 367 (1962); *Citizens to Preserve Overton Park v. Volpe* 401 U.S. 402 (1971).

The District Court also asserted that there was a statutory preclusion of review. Jurisdiction would not be held to exist absent appellant carrying a burden of demonstrating, clear and convincing evidence of either specific statutory reviewability, or of a constitutional infringement. However, Petitioner herein challenges the very existence of the alleged statutory preclusive limitation of 5 U.S.C. 8128(b) as being even validly considered as such a preclusion against any citizen of the Untied States.

As noted hereinabove, Section 8128(b) was adopted after World War II and dealt specifically with foreign nationals in the employ of the United States of America. Because of erroneous codification of this provision, Section 8128(b) has been expanded to cover areas that it was never designed nor intended to cover.

The 1945 amendments to FECA were passed to address certain provisions, such as benefit formulas for

claimants, which were not within the discretion of administrators of the Act to vary or to deviate from. The purpose of the amendment was to deal with cases of U.S. employees who were noncitizens of the United States serving outside the United States, who had been interred in Japanese concentration camps during the war. The problems to be accommodated involved, first of all, providing coverage for noncitizens in areas other than those in the Panama Canal Zone and Alaska which were, as of then, the only noncitizens working outside the United States who had some degree of coverage under FECA. The coverage for that already existing category of noncitizen, nonresident employees was set forth as Section 42 of the 1916 Act, and was codified under 5 U.S.C. Section 793. Thus, Section 42 of the 1916 Act had to be significantly expanded.

There was also the problem that existing time limits needed to be revised so that those interred (including some American Citizens) and thus unable to file on their claims within the applicable statutory time limits, could still be accommodated. At the time, there were about 400 special Bills pending before Congress seeking relief in individual cases and more were arriving. The only thrust of the bill was to provide for the needs of those special cases, in foreign locations and not to make any other change in FECA as pertains to the provisions concerning citizen employees functioning within the United States. Thus, the changes in the time limits was specified to amend a section of the FECA applicable to all FECA claimants, which accommodated both the U.S. Citizen and the noncitizen internees alike. The other substantive change was a change to the then existing Section 42 of the FECA, which broadened it to cover the noncitizen internees and provided the administrators authority to administer the Act pertaining to noncitizens in a discretionary way, as opposed to the

strict application of statutorily prescribed compensation formulas, and to be immune from judicial review in the application of that discretion. Those provisions were enacted as section 4 of PL 79-161 (see Appendix H) and the Floor debate associated therewith (see Appendix I)

The discussion on the floor of the House is unmistakable in its intent to simply accommodate an emergency need pertaining to noncitizens in locations outside the United States, such as Guam and the Philippines. There, Mr. Walter of Pennsylvania, the Floor Manager of the Bill, after discussing sections one, two, and three, of the bill then said,

> "The fourth section has to do with payment of compensation to employees of the United States in foreign countries ...."

and then outlined some of the necessity for taking such action. Immediately following Mr. Walter's outline of the basis for a need to implement a provision for covering such noncitizen nonresident employees, and for giving the administrators of the Act the exceptional authority to award compensation by discretionary decision rather than the application of formulas that are applicable to all other persons other than those noncitizen nonresidents, Mr. Gwynne of Iowa interrupted, and asked the following question:

> "As I understand, the last provision applies only to people who are not citizens or residents of this country." (emphasis added)

Mr. Walter then responded,

> "That is correct."

The essence of the perception that there is a statutory withdrawal of judicial review applicable to all FECA

claimants, is a theory that is diametrically opposed to what the legislators emphatically discussed there. Clearly Congress, in bestowing that extraordinary discretionary latitude on the administrators of the Act to award compensation amounts based on their individual evaluations, rather than on the basis of the prescribed formulas applicable to everyone else, likewise gave those administrators immunity from having that discretionary determination judicially reviewed, and such grant of immunity from judicial review was a feature of this section four which was clearly agreed on the House floor to be applicable only to the noncitizen non residents.

However, because of a mistake in codification, the statutory withdrawal from judicial review provision has been included and applied to persons generally affected by FECA. It never appeared in the earlier provisions of the Act. See Appendix A for original versions of the Act.

The opinion in the Eighth Circuit Court of Appeals did not deal substantively with any of these issues. The opinion entered by the Appeals Court addressed only a factual issue, one likewise improperly, not fully tried in the District Court; that being whether the Department of Labor Form CA-8 needed to be filled out. As a practical matter, the CA-8 controversy is a smoke screen utilized by the Government as a means of preventing review. As a point of fact, the District Court while not ruling specifically on whether or not there was valid requirement for the form to be filled out; did determine that the purposes for which the forms were purportedly needed, was not authorized by the FECA.

No jurisdiction means no jurisdiction. If jurisdiction is bad in the District Court, then the non-issue of the CA-8 Form should not have been addressed by the Court of Appeals. If the issue of the propriety or

impropriety of the requiring of the CA-8 earnings reports from total disability claimants is properly justiciable at all, it is a matter for remand to the District Court. The question that brought this issue to the Court of Appeals and for which certiorari is asked, is simply whether or not a statutory withdrawal of judicial review pertaining to a United States citizen injured on domestic soil exists as an enactment of Congress, and if it does not, is there any other basis for considering the codification error to constitute a "statutory withdrawal". It should have been decided at the Eighth Circuit level. It has not yet been reached.

There are both statutory and Constitutional Issues asserted in this case. See Gulle v. First National Bank in Meridian, 299 U.S. 109 (1936). Under 28 U.S.C. Section 1331, a right for immunity created by the Constitution or laws of the United States must be an essential element of plaintiff's cause of action. There is statutory mandate that once the Secretary of Labor has ruled a person "entitled to injury compensation," the Secretary shall pay a specified amount on a specified frequency. That creates an entitlement to the money for Petitioner herein, said entitlement being created by law of the United States, and of which he could not be deprived without due process of law as provided in the Fifth Amendment of the Constitution of the United states. The duty of the Government was merely ministerial to follow the law and to pay Petitioner. The Government's refusal to follow the law implicates the rights of Petitioner under the Fifth Amendment of the Constitution of the United States.

There is a wide impact attached to the issues involved here. There are hundreds of thousands of injured federal employees who are, and have been for several years now, deprived of their day in Court because of the mistaken belief that their representatives

in Congress had statutorily withdrawn judicial review from them. The problem has been exacerbated by the fact that the language Congress used to withdraw judicial review from the respondent's exercise of the authority to deviate from the formulas when dealing with noncitizen nonresident injured employees; has been hailed by many Courts, including this one, as a "model preclusion of review" language. That is undeniably true for that limited class of persons to whom this language applies.

Congress did a very clear job of stating the preclusion in unmistakable terms. The problem is simply that it is not the clarity of the words that is at issue; it is the scope of applicability. It has simply gone unnoticed that this very clear expression of preclusion of review was enacted pertaining to a very limited class of persons, to wit: noncitizen, nonresident injured federal employees. There is no error in the expressions this Court has made in this area in the past. This Court has held that Congress has the right to withhold judicial review, and that is inarguable. In other cases, this Court has held that the 5 U.S.C. §8128(b) language of intent to withdraw judicial review is clear and unmistakable, and indeed it is. This Court has, up to now, never had occasion to examine the root question involved in this petition, and that is the scope of applicability of that very clear language which Congress had the undeniable right to legislate. Neither has any other Court, for apparently no litigant has ever raised it before. Obviously Courts do not, and should not answer questions that are not in controversy in a given case.

Article 1, sections 1 and 8 of the Constitution of the United States, places the law making powers for this country in the Congress. Allowing anyone, even a staff office of the legislature, such as the Office of Law Revision Counsel, to either intentionally or unintentionally substantively modify what the Congress

as a body enacted, takes the law making power away from Congress and subjects citizens of this country to a law making process at odds with that constitutional mandate.

There is a great body of decisional law both out of this Court and out of the various Circuit Courts of Appeal that has been based on this apparent miscodification of FECA. The clear Congressional intent as evidenced in the floor debate on the 1945 amendment was different from that which has been routinely cited as the Congressional will. As a result, multitudes of federal employees have been stripped of appeal rights to the Courts, when in fact Congress intended by Section 4 of Public Law 79-161 to address only a very limited number of pending and prospective cases.

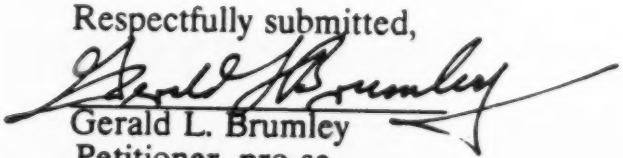
Because of this misperception based on miscodification, there is a need for this Court to speak definitively to this issue and provide the Circuits guidance in future decisions relating to this question.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Dated: November 10, 1994

Respectfully submitted,



Gerald L. Brumley
Petitioner, pro se

APPENDIX A

TEXT FROM THE DECISION OF UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Gerald L. Brumley, Appellant,

V.

United States Department of Labor, Appellee.

No. 93-3051

Submitted:May 9, 1994
Filed: June 16, 1994
Rehearing Denied Aug. 2, 1994

Before BOWMAN, LOKEN, and HANSEN, Circuit Judges,

PER CURIAM.

Gerald Brumley appeals from the district court's[1] order dismissing his suit under the Federal Employees Compensation Act (FECA), 5 U,S,C. § 8101. We affirm.

Brumley filed a pro se complaint alleging that the

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[1] The honorable Elsijane Trimble Roy, Senior United States District Judge for the Eastern and Western Districts of Arkansas.

Department of Labor (DOL) , through the Office of Workers Compensation Programs (OWCP), failed to disburse FECA benefits for his disability. According to the complaint, OWCP accepted Brumley's claim of total disability and required him to choose either FECA benefits or Federal Employees Retirement Act (FERA) benefits. Brumley originally elected FERA annuity payments for the period of January 1985 through December 1987. Brumley then elected to receive, retroactively, FECA benefits for the same period, less reimbursement to the Office of Personnel Management (OPM) for the distributed FERA payments. Brumley alleged that OWCP did not acknowledge the retroactive election despite his successive demands. The DOL answered that Brumley did not comply with regulatory requirements in seeking to retroactively change FERA benefits to FECA because he did not complete form CA-8, required by 20 C.F.R, §10.122, on which a claimant must report his earnings.

The district court dismissed Brumley"s claim for lack of subject matter jurisdiction. The court held that 5 U.S,C, § 8128(b) precluded review of final and conclusive actions of the Secretary unless DOL violated the Constitution or a clear statutory mandate. The district court found that DOL did not violate a clear statutory mandate by requiring an earnings report and, therefore, the court lacked jurisdiction to review the agency's regulatory requirement.

Section 8128(b) states: "The action of the Secretary or his designee in allowing or denying a payment . . . is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U,S.C. § 8128(b). The plain meaning of section 8128 shows Congressional intent "to bar judicial review altogether." *Lindahl v,*

Office of Personnel Management 470 U.S. 768, 779-80 & n,13 (dictum referring to section 8128(b) as a model preclusion-of review statute); see also, *Waters v. United States,* 458 F.2d 20, 22 (8th Cir. 1972). However, it has been held that the preclusion-of-review statute cannot serve to immunize DOL from judicial review when its actions violate the Constitution or a clear statutory mandate. *See Woodruff v. United States Dep't of Labor,* 954 F.2d 634, 639 (11th Cir. 1992); *Owens v. Brock,* 860 F.2d 1363, 1367 (6th Cir. 1988); *see also Mercied Area X (Educ.) v. Cleland*, 604 F.2d 1075, 1078 (8th Cir. 1979) (regarding Veterans Administration preclusion-of-review statute).

Brumley argues that 5 U.S.C. § 8105 does not empower DOL to require earnings reports or make wage earning capacity determinations and, therefore, that DOL violated a clear statutory mandate by requiring him to disclose his earnings. Section 8105 does not expressly mention earning capacity or earning reports, Section 8105(a) defines FECA benefits: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation, equal to 66 2/3 percent of his monthly pay . . . . " 5 U.S.C, § 8105(a) (emphasis added). "Disability," in turn, is defined as "the incapacity,, because of employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R, § 10.5(17). Therefore, the DOL needs the earnings information required on form CA-8 to assess an essential element of the claimant's continued disability: wage earning capacity. Thus, given its broad policy-making authority to administer and enforce FECA, the DOL's regulatory interpretation of section 8105(a) does not violate a clear statutory mandate. See *Woodruff*, 954 F.2d at 640. As a result, we agree with the district court that it lacked subject matter jurisdiction. Last, we deny Brumley's motion for

oral argument.

Accordingly, we affirm the judgment of the district court.

APPENDIX B

TEXT FROM DISTRICT COURT DECISION IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF ARKANSAS

No. LR-C-91-529

GERALD L, BRUMLEY, Plaintiff

vs.

UNITED STATES DEPARTMENT OF LABOR, Defendant

ORDER

By previous order, this Court has made a preliminary declaratory finding that the Secretary of Labor has no statutory authority under the Federal Employees Compensation Act to require earnings reports of persons, like the plaintiff, who are in the total disability category. In subsequently filed pleadings, the government has asked the Court to reconsider this finding, as well the Court's earlier determination that it even has jurisdiction to consider the matter. The Secretary moves for dismissal, or alternatively, for summary judgment. Mr, Brumley urges the Court to stand by its previous determinations on both issues and also moves for summary judgment.

After careful reconsideration of the arguments of both sides, the Court now finds that it is without jurisdiction to consider plaintiffs claim. Accordingly, the

defendant's motion to dismiss will be granted.

The Court sets out below some of the factual information found in the previously issued order: The plaintiff is a person classified as having "total disability" under the Federal Employees's Compensation Act, 5 U.S.C. § 8101 et seq ("FECA"). This program is administered by the defendant, the United States Department of Labor.[1] The plaintiff is also entitled to annuity payments pursuant to the Federal Retirement Act, 5 U.S.C. §8301 et seq. ("FERA"). Both FERA and FECA provide that a claimant may not receive benefits from the two programs simultaneously; one must elect from which program he wishes to receive benefits. However, one may generally switch back and forth at his sole discretion as often as desired.

The plaintiff first received benefits for temporary total disability on August 8, 1974, For certain periods of time since then, Mr, Brumley elected to receive benefits under FERA from the Office of Personnel Management ("OPM"). However, or about February 28, 1991, plaintiff informed OPM that he was electing FECA benefits for the period January 5, 1985, through December 30, 1987. Since that time the defendant has not processed Mr. Brumley's election, which has resulted in plaintiff filing this action to compel the Department of Labor to do so. The position the DOL now takes in its briefs is that it is not required to process plaintiff's election of benefits unless and until plaintiff fills out its form "CA-8," which inquires into, among other things, a claimant's employment earnings.

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[1] FECA is a comprehensive workers' compensation law for federal employees that is designed to provide quick and uniform coverage for work-related injuries. *Woodruff v. United States Department of Labor*, 954 F.2d 634 (11th Cir. 1992).

The issue Mr. Brumley wishes the Court to address is whether the DOL has statutory authority to require people classified with "total disability" ratings under FECA to report their earnings from employment or self-employment as a condition to their receiving disability benefits under that Act. The defendant's argument in a nutshell is that it has been given by Congress the power to pass whatever regulations it deems necessary to administer its programs and it has the final say on settling disputes, including this one, relating to those regulations. The plaintiff does not dispute in general the Secretary's authority to promulgate such regulations, nor to "decide all questions arising under" same. 5 U.S,C, S 8145.[2] Instead, plaintiff argues that the particular action the defendant would require of the plaintiff is contrary to the intent of Congress and is not authorized by statute.

Exceptions to the Preclusion Rule

As mentioned above, the Department points to § 8145 as its statutory authority to "decide all questions arising under" these Acts. It also points to S 8128(b) as precluding this Court from reviewing its decisions. This preclusion statute reads as follows:

The action of the Secretary [of Labor] or

---

[2] That statute reads as follows:

> The Secretary of Labor shall administer, and decide all questions arising under, this subchapter [5 U.S.C. §§ 8101 et seq.]. He may --
>
> (1) appoint employees to administer this subchapter; and
>
> (2) delegate to any employee of the Department of Labor any of the powers conferred on him by this subchapter.

> his designee in allowing or denying a payment under this subchapter is
> (1) final and conclusive for all purposes and with respect to all question@ of law and fact; and
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U,S,C, S 8128(b) . "The language is clear and, its meaning unmistakable: Federal courts have no jurisdiction to review final judgments of the Secretary of Labor and his officers..." *Staacke v, United States Secretary of Labor,* 841 F.2d 278, 281 (9th Cir, 1988)(emphasis added).

In *Staacke*, the Court of Appeals for the Ninth Circuit discussed the breadth of this preclusion language, but also discussed two exceptions to the rule.

> Significantly, the Supreme Court has singled out section 8128(b) as a model preclusion-of-review statute, noting that Congress uses such "unambiguous and comprehensive" language "when [it] intends to bar judicial review altogether." *Lindahl v, Offense of Personnel Management*, 470 U.S. 768, 779-80 & n,13,
>
> Even where the statutory provision absolutely bars judicial review, however, there are two situations where review is nonetheless available: First, courts

> maintain jurisdiction to consider constitutional claims [citation omitted]; and, second, jurisdiction exists where defendant is charged with violating a clear statutory mandate or prohibition ....

Staacke, 841 F.2d at 281. *Accord, Woodruff v. Department of Labor,* 954 F,2d 634 (llth Cir, 1992); *Sheehan v, United States,* 896 F.2d 1168 (9th Cir, 1990); and *Owens v, Brock,* 860 F.2d 1363, 1367 (6th Cir, 1988)("Except for cases alleging that the Secretary violated a claimant's constitutional rights or exceeded the scope of his congressional mandate, courts have unanimously held that section 8128(b) prohibits judicial review .... 11) *But see Paluca v. Secretary,* 813 F.2d 524 (lst Cir. 1987), *cert. denied sub. nom Roberts v, Secretary of Labor*, 484 U.S. 943, 108 S.Ct. 328 (1987)(holding that though a district court has jurisdiction over constitutional challenges to the Secretary's actions administering FECA, no jurisdiction exists to hear challenges based on statutory grounds).
Therefore, in order for this Court to be able to exercise jurisdiction over the instant case, Mr. Brumley's claim must come under one of these two specific exceptions. Otherwise, the Court has no choice but to dismiss his case.

1.Constitutional claims

Plaintiff argues that though Congress specifically granted the Secretary the authority under 5 U.S.C. § 8106 to order a partially disabled employee to report his earnings from employment, any similar grant of authority

is conspicuously absent from the companion statute, § 8105, dealing with people determined to have total disability.[3] He argues that the only possible conclusion that can be drawn is that Congress obviously did not want the DOL to have the authority to make such an inquiry, and in fact has withheld that authority from DOL,

The plaintiff has sometimes characterized his objection as a constitutional one; the Department exercising authority not granted by Congress would be a "separation of powers" type violation. However, the Court believes it more appropriate to view Mr. Brumley's complaint as a charge that the DOL has "violat[ed] a clear statutory mandate or prohibition ...."

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[3] The statute provides:

§ 8105. Total Disability

(a) If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.

(b) The loss of use of both hands, both arms, both feet, or both legs, or the loss of sight of both eyes is prima facie permanent total disability.

§ 8106. Partial Disability

(a) If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.

(b) The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. [remainder of section omitted]

Staacke, at 281,

If, in the present context, exercising authority withheld by Congress (plaintiff's allegation) is not violating a statutory mandate, then the term has no meaning to this Court. Even if one were to concede that what plaintiff has alleged is technically a constitutional claim as well as a statutory one (as perhaps is true in a broad sense) it clearly is not the type of constitutional claim found in the reported cases.

For example, in *Woodruff,* the plaintiff alleged a deprivation of a property interest without due process, as well as a violation of the separation of powers doctrine due to the governments refusal to follow established caselaw. In *Paluca,* 813 F-2d 524, the 1st Circuit found that jurisdiction existed for the district court to consider the merits of plaintiffs equal protection challenge. Mr. Brumley's allegation is nothing like those.

In the context of determining whether jurisdiction exists in FECA complaints brought in district court, appellate courts clearly recognize a distinction between constitutional claims and "statutory" ones. It is the opinion of this Court that if the distinction is to have any meaning, then what constitutes a constitutional claim must involve more than what Mr, Brumley has alleged in this case. Thus, the Court holds that for this Court to have jurisdiction over this cause, the Court must find that the action of the DOL which plaintiff complains of here violates a "clear statutory mandate or prohibition."

2.Clear statutory mandate or prohibition

The issue before the Court is a limited one:

> Our task is limited to determining whether the statute in question contains a clear command that the Secretary has transgressed. Where, as here, the statute is capable of two plausible interpretations, the Secretary's decision to adopt one interpretation over the other cannot constitute a violation of a clear statutory mandate.

Staacke, 841 F,2d at 282. "Our task is not to develop our own interpretation [of a statute], nor is it to choose the best of two competing interpretations," *Woodruff*, 954 F,2d at 640,

There seems to be little guidance in the reported cases for determining whether certain statutory language constitutes a "clear statutory mandate or prohibition." The Court is tempted to adopt some variation of Mr, justice Stewart"s "I know it when I see it" test.[4] Perhaps, "if there is any doubt whether the language is 'clear,' then it isn't."

Instead, in making the determination of whether §§ 8105 and 8106 contain a "clear statutory mandate or prohibition" that has been violated, this Court will consider these factors: the specific language of the statutes purporting to limit the defendants authority, the context in which those statutes appear,in the Act as a whole, and the interpretation of those statutes by other courts.

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[4] Articulated in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 198.

Examples of cases where a "clear, statutory mandate" was violated are *Leedom v, Kyne*, 358 U.S, 184 (1958) and *Oestereich v. Selective Service System*, 393 U,S, 233 (1968). In *Leedom*, the Supreme Court described as "clear and mandatory" a portion of the National Labor Relations Act governing how units of employees for the purposes of collective bargaining would be determined: "the Board shall not decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Section 9(b) of the Act as quoted in *Leedom* (emphasis added by the *Leedom* court).

Nevertheless, on one occasion the Board took such action anyway after refusing to determine whether a majority would vote for such an arrangement. The Supreme Court found that jurisdiction existed to review, and strike down, this action of the Board. "Plainly, this was an attempted exercise of power that had been specifically withheld." *Leedom*, at 184.

In *Oestereich*, the Supreme Court found that jurisdiction existed to review a draft board's decision to deny a draft exemption to a divinity student, despite unequivocal language in the Selective Service Act which providing that "[r]egular or duly ordained ministers ... and students preparing for the ministry ... shall be exempt from training and service .., under this title," *Oestereich*, 393 U.S, at 235, quoting Section 6(g) of the Selective Service Act, In both of those cases one can easily appreciate how clear-cut the language at issue was.

Plaintiff argues that in the instant case, language

in §§ 8105 and 8106 purportedly withholding authority from the defendant is just as clear. However, the Court finds that not to be the case. In *Leedom* and *Oestereich*, language like "the board shall not decide" and "students ... shall be exempt" was used by Congress. In the case before this Court, plaintiff asks the Court to infer a statutory prohibition by the "conspicuous absence" of a grant of authority in § 8105 to require earnings information from those totally disabled. His position that the DOL is acting without congressional authority when requiring earnings reports from those with total disabilities is chiefly built around the case of *United States v, Dorey,* 711 F,2d 125 (9th Cir, 1983). As this Court wrote in its previous order, in *Dorey* a criminal defendant was charged with violating 18 U,S,C, §1001[5] by making a false statement in a report "required by section 8106 of Title 5, United States Code".[6] The Ninth Circuit reversed his conviction because it determined that the prosecution had failed to prove that Mr. Dorey was required by law to file a report under S

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[5] 18 U.S.C. § 1001 provides:
Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

[6] The plaintiff, Mr. Brumley, is not accused of making false or misleading statements to the Secretary, nor is he charged with any sort of crime.

8106.

In so doing, the Court in *Dorey* compared sections 8105 and 8106. It noted that § 8106(b) says the "Secretary of Labor may require a partially disabled employee to report his earnings from employment ...." (emphasis added) It further noted that "[n]owhere in section 8106 is there any reference to total disability, Section 8105, however, [addresses total disability]." The Court continued:

> It is also significant that section 8105, which was enacted on the same date as section 8106, does not authorize the Secretary of Labor to require totally disabled person [sic] to report his or her earnings from employment or self-employment. It is obvious then that when Congress wishes to give the Secretary of Labor the authority to require a report of employment from a person receiving benefits, it knows how to do so.
>
> We have no hesitancy in concluding that section 8106 by its terms does not permit the Secretary of Labor to require a temporarily totally disabled person to file a report.

Dorey, 711 F,2d at 127-128 (emphasis in original).

Standing alone and read broadly, *Dorey* would suggest at least one Court of Appeals believes the language of §§ 8105 and 8106 to be quite clear regarding whether the Secretary has statutory authority to require earnings reports from those with total disabilities.

However, the Ninth Circuit has since written that "*Dorey* is a narrow decision, limited to its own facts." *United States v, Austin*, 817 F,2d 1352, 1354, (9th Cir, 1987).

The Court in *Austin* pointed out that defendant Dorey was charged with making a false statement on a "report required by section 8106 ...." Because § 8106 requires no report from one totally disabled, Dorey's conviction was overturned. However, the defendant in *Austin* was simply charged with making a false statement on a form required by the Department of Labor. His conviction was affirmed because, in order to allege a violation of § 1001, "the government is not required to prove that the defendant had a duty under some other statute to disclose." Id,, at 1354,

The Ninth Circuit had distinguished *Dorey* the same way in *U.S. v. Olson,* 751 F.2d 1126 (9th Cir, 1985) and *U,S, v, DeRosa,* 783 F,2d 1401 (9th Cir, 1986) , In *Olson,* the Court pronounced that "§ 1001, by itself, required Olson to disclose the information he has been accused of withholding." 751 F,2d at 1128; *accord United States v, Kappes,* 936 F.2d 227 (6th Cir, 1991),

In *Austin,* the defendant argued on appeal that the trial court had committed error in allowing the introduction into evidence of the Department's operating manual, which presumably directs department officials to require those with temporary total disabilities to submit earnings reports. Austin argued that the manual was in conflict with § 8105, The Ninth Circuit disagreed and emphasized the language of S 8105(a) which states that the employee will be paid monthly compensation "during the disability." "Thus, it is implicit in the statutory scheme for the Department to make inquiries to

determine whether the disability or dependency has ended," 817 F,2d at 1355,

The Court finds this language of the Ninth Circuit to be significant. It seems a fair inference that that court, while not repudiating *Dorey* entirely, has at least retreated to.the position that even if the Department has no right under S 8106 to require earnings reports from those temporarily totally disabled, it can still require them pursuant to an implied authority under S 8105,

In summary, plaintiff wishes the Court to find that §§ 8105 and 8106 of Title 5, United States Code contain a clear, unmistakable statutory mandate or prohibition, within the meaning of applicable caselaw, that forbids the defendant from requiring plaintiff and others similarly situated to report their earnings before their benefits will be paid to them. There is no explicit language to that effect in the statute. Rather, the Court would have to infer the prohibition from the absence of an explicit grant of authority to require said information. The Court will not do so.

Furthermore, the holding in the case the plaintiff chiefly relies on to support his "mandate by inference" theory has subsequently been limited by the deciding court to its own facts. Also, consideration of the Act as a whole allows a reasonable inference that Congress was aware that some people are only disabled temporarily and the Department would need some sensible means of determining when, or to what degree, those disabilities later ceased. The Court concludes that no clear

statutory mandate or prohibition is being violated by the defendant,

Because the plaintiff has neither alleged a substantial constitutional claim, nor properly shown the defendant has violated a clear statutory mandate or prohibition, this Court is without jurisdiction to hear plaintiff's claim. The "master" of the words of 5 U.S.C. §§ 8105 and 8106 is the Secretary, not this Court. It is he who shall supply them with whatever meaning he wishes.[7]

According, it is hereby

ORDERED that the defendant's motions for reconsideration and for dismissal are granted; the plaintiff's motion for summary judgment is denied. All other pending motions are thereby rendered moot.

August 3, 1993

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[7] "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master--that's all."

Lewis Carroll, *Through the Looking-Glass*, (1872)

APPENDIX C

TEXT OF ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-3051EALR

Gerald L. Brumley, Appellant,

vs.

United States Department of Labor, Appellee.

Appellant's pro se petition for rehearing has been considered by the Court and is denied.

August 2, 1994

APPENDIX D

TEXT OF ORDER OF THE SUPREME COURT OF THE UNITED STATES

Granting enlargement of time to file Petition for writ of certiori

No.A-303

Gerald L, Brumley,
Petitioner

v.

United States Department of Labor

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 10 , 1994.

/s/ Clarence Thomas
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of October, 1994,

APPENDIX E

EXCERPTS FROM THE CONSTITUTION OF THE UNITED STATES

ARTICLE 1.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. ...

Section 8. The Congress shall have power ...

...To make rules for the Government and Regulation of the land and navel Forces: ...

...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

APPENDIX F

EXCERPT FROM THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall an person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix G

EXCERPT FROM P.L. 64-266, 39 STAT 742

64th CONG., 1st SESS--CH458--SEPT. 7, 1916

CHAP.458. - An Act To provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

Sec. 2. That during the first three days of disability the employee shall not be entitled to compensation except as provided in section 9.

Sec. 3. That if the disability is total the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of his monthly pay, except as hereinafter provided.

Sec. 4. That if the disability is partial the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of the difference between his monthly pay and his monthly wage earning capacity after the beginning of such partial disability. The Commission

may from time to time, require a partially disabled employee to make an affidavit as to the wages which he is then receiving. In such affidavit the employee shall include a statement of the value of housing, board, and other advantages which are received from the employer as part of his remuneration and which can be estimated in money. If the employee, when required, fails to make such affidavit, he shall not be entitled to any compensation while such failure continues, and the period of such failure shall be deducted from the period during which compensation is payable to him.

Sec. 5. That if a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him, he shall not be entitled to any compensation.

Sec. 6. That the monthly compensation for total disability shall not be more than $66.67 nor less than $33.33, unless the employee's monthly pay is less than $33.33, in which case his monthly compensation shall be the full amount of his month pay. The monthly compensation for partial disability shall not be more than $66.67. In the case of persons who at the time of the 'injury were minors or employed in a learner's capacity and who were not physically or mentally defective, the commission shall, on any review after the time when the monthly wage-earning capacity of such persons would probably, but for the injury, have increased, award compensation based on such probable monthly wage-earning capacity. The commission may, on any review after the time when the monthly wage-earning capacity of the disabled employee would probably, irrespective of the injury, have decreased on account of old age, award compensation based on such probable monthly wage-earning capacity.

Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until

the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, except pensions for service in the Army or Navy of the United States.

Sec. 8. That if at the time disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased.

Sec. 9. That immediately after an injury sustained by an employee while in the performance of his duty, whether or not disability has arisen, and for a reasonable time thereafter, the United States shall furnish to such employee reasonable medical, surgical, and hospital services and supplies unless he refuses to accept them. Such services and supplies shall be furnished by United States medical officers and hospitals, but where this is not practicable shall be furnished by private physicians and hospitals designated or approved by the commission and paid for from the employees' compensation fund. If necessary for the securing of proper medical, surgical, and hospital treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employees' compensation fund.

Sec. 10. That if death results from the injury within six years the United States shall pay to the following persons for the following periods a monthly compensation equal to the following percentages of the deceased employee's monthly pay, subject to the modification that no compensation shall be paid where the death takes place more than one year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury:

(A) To the widow, if there is no child, thirty-five per centum. This compensation shall be paid until her death or marriage.

(B) To the widower, if there is no child, thirty-five per centum if wholly dependent for support upon the deceased employee at the time of her death. This compensation shall be paid until his death or marriage.

(C) To the widow or widower, if there is a child, the compensation payable under clause (A) or clause (B) and in addition thereto ten per centum for each child, not to exceed a total of sixty-six and two-thirds per centum for such widow or widower and children. If a child has a guardian other than the surviving widow or widower, the compensation payable on account of such child shall be paid to such guardian. The compensation payable on account of any child shall cease when he dies, marries, or reaches the age of eighteen, or, if over eighteen, and incapable of self-support, becomes capable of self-support.

(D) To the children, if there is no widow or widower, twenty-five per centum for one child and ten per centum additional for each additional child, not to exceed a total of sixty six and two-thirds per centum, divided among such children share and share alike. The compensation of each child shall be paid until he dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support. The compensation of a child under legal age shall be paid to its guardian.

(E) To the parents, if one is wholly dependant for support upon the deceased employee at the time of his death and the other is not dependent to any extent, twenty-five per centum; if both are wholly dependent, twenty per centum to each; if one is or both are partially dependant a proportionate amount in the discretion of the commission.

The above percentages shall be paid if there is no

widow, widower, or child. If there is a widow, widower, or child , there shall be paid so much of the above percentages as, when added to the total percent a payable to the widow, widower, and children, will not exceed a total of sixty-six and two-thirds per centum.

(F) To the brothers, sisters, grandparents, and grandchildren if one is wholly dependent upon the deceased employee for support at the time of his death, twenty per centum to such dependent; if more than one are wholly dependent, thirty per centum, divided among such dependents share and share alike; if there is no one of them wholly dependent, but one or more partly dependent, ten per centum divided among such dependents share and share alike.

The above percentages shall be paid if there is no widow, widower, child, or dependant parent. If there is a widow, widower, child, or dependent parent, there shall be paid so much of the above percentages as, when added to the total percentage payable to the widow, widower, children, and dependent parents, will not exceed a total of sixty-six and two-thirds per centum.

(G) The compensation of each beneficiary under clauses (E) and (F) shall be paid for a period of eight years from the time of the death, unless-before that time he, if a parent or grandparent, dies, marries, or ceases to be dependent, or if a brother or sister or grandchild, dies, marries, or reaches the age of eighteen, or if over eighteen and incapable of self-support, becomes capable of self-support. The compensation of a brother, sister, or grandchild under legal age shall be paid to his or her guardian.

(H) As used in this section, the term "child" includes stepchildren, adopted children, and posthumous, children, but does not include married children. The term "brother" and "sister " include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but do not include married

brothers or married sisters. All of the above terms and the term "grandchild" include only persons who at the time of the death of the deceased employee are under eighteen years of age or over that age and incapable of self-support. The term "parent" includes step-parents and parents by adoption. The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death. The term "widower" includes only the decedent's husband dependent for support upon her at the time of her death. The terms "adopted" and "adoption" as used in this clause include only legal adoption prior to the time of the injury.

(I) Upon the cessation of compensation under this section to or on account of any person, the compensation of the remaining persons entitled to compensation for the unexpired part of the period during which their compensation is payable shall be that which such persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death.

(J) In case there are two or more classes of persons entitled to compensation under this section and the apportionment of such compensation, above provided, would result in injustice, the commission may, in its discretion modify the apportionment to meet the requirements of the case.

(K) In computing compensation under this section, the monthly, pay shall be considered not to be more than $100 nor less than $50, but the total monthly compensation shall not exceed the monthly pay computed as provided in section twelve.

(L) If any person entitled to compensation under this section, whose compensation by the terms of this section ceases upon his marriage, accepts an payments of compensation after his marriage he shall be punished by a fine of not more than $2,000 or by imprisonment for

not more than one year, or by both such fine and imprisonment.

Sec. 11. That if death results from the injury within six years the United States shall pay to the personal representative of the deceased employee burial expenses not to exceed $100, in the discretion of the commission. In the case of an employee whose home is within the United States, if his death occurs away from his home office or outside of the United States, and if so desired by his relatives, the body shall, in the discretion of the commission, be embalmed and transported in a hermetically sealed casket to the home of the employee. Such burial expenses shall not be paid and such transportation shall not be furnished where the death takes place more than one year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury.

Sec. 12. That in computing the monthly pay the usual practice of the service in which the employee was employed shall be followed. Subsistence and the value of quarters furnished an employee shall be included as part of the pay but overtime pay shall not be taken into account.

Sec. 13. That in the determination of the employee's monthly earning capacity after the beginning of partial disability, the value of housing, board, lodging, and other advantages which are received from his employer as a part of his remuneration and which can be estimated in money shall be taken into account.

Sec. 14. That in cases of death or of permanent total or permanent partial disability, if the monthly payment to the beneficiary is less than $5 a month, or if the beneficiary is about to become a nonresident of the United States, or if the commission determines that it is for the best interests of the beneficiary, the liability of the United States for compensation to such beneficiary

may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at four per centum true discount compounded annually. The probability of the beneficiary's death before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality; but in case of compensation to the widow or widower of the deceased employee, such lump sum shall not exceed sixty months' compensation. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

Sec. 15. That every employee injured in the performance of his duty, or some one on his behalf, shall, within forty eight hours after the injury, give written notice thereof to the immediate superior of the employee. Such notice shall be given by delivering it personally or by depositing it properly stamped and addressed in the mail.

Sec. 16. That the notice shall state the name and address of the employee, the year, month, day, and hour when and the particular locality where the injury occurred, and the cause and nature of the injury, and shall be signed by and contain the address of the person giving the notice.

Sec. 17. That unless notice is given within the time specified or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed, but for any reasonable cause shown, the commission may allow compensation if the notice is filed within one year after the injury.

Sec. 18. That no compensation under this Act shall be allowed to any person, except as provided in section thirty eight, unless he or some one on his behalf shall, within the time specified in section twenty, make a written claim therefor. Such claim shall be made by

delivering it at the office of the commission or to any commissioner or to any person whom the commission may by regulation designate, or by depositing it in the mail properly stamped and addressed to the commission or to any person whom the commission may by regulation designate.

Sec. 19. That every claim shall be made on forms to be furnished by the commission and shall contain all the information required by the commission. Each claim shall be sworn to by the person entitled to compensation or by the person acting on his behalf, and, except in case of death, shall be accompanied by a certificate of the employee's physician stating the nature of the injury and the nature and probable extent of the disability. For any reasonable cause shown the commission may waive the provisions of this section.

Sec. 20. That all original claims for compensation for disability shall be made within sixty days after the injury. All original claims for compensation for death shall be made within one year after the death. For any reasonable cause shown the commission may allow original claims for compensation for disability to be made at any time within one year.

Sec. 21. That after the injury the employee shall, as frequently and at such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician designated or approved by the commission. The employee may have a duly qualified physician designated and paid by him present to participate in such examination. For all examinations after the first the employee shall, in the discretion of the commission, be paid his reasonable traveling and other expenses and loss of wages incurred in order to submit to such examination. If the employee refuses to submit himself for or in any way obstructs any examination, his right to claim compensation under this Act shall be

suspended until such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and the period of such refusal or obstruction shall be deducted from the period for which compensation is payable to him.

Sec. 22. That in case or any disagreement between the physician making an examination on the part of the United States and the employee's physician the commission shall appoint a third physician, duly qualified, who shall make an examination.

Sec. 23. That fees for examinations made on the part of the United States under sections twenty-one and twenty-two by physicians who, are not already in the service of the United States shall be fixed by the commission. Such fees, and any sum payable to the employee under section twenty-one, shall be paid out the appropriation for the work of the commission.

Sec. 24. That immediately after an injury to an employee resulting in his death or in his probable disability, his immediate supervisor shall make a report to the commission containing such information as the commission may require, and shall thereafter make such supplementary reports as the commission may require.

Sec. 25. That any assignment a claim for compensation under this Act shall be void and all compensation and claims therefor shall be exempt from all claims of creditors.

Sec. 26. If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary

to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this Act.

The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him.

Sec. 27. That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury.

Sec. 28. That a commission is hereby created, to be known as the United States Employees' Compensation Commission and to be composed of three commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman. No commissioner shall hold any other office or position under the United States. No more than two of said commissioners shall be members of the same political party. One of said commissioners shall be appointed for a term of two years, one for a term of four years, and one for a term of six years, and at the expiration of each of said terms, the commissioner then appointed shall be appointed for a period of six years. Each commissioner shall receive a salary of $4,000 a year. The principal office of said commission shall be in Washington, District of Columbia, but the said commission is authorized to perform its work at any place deemed necessary by said commission, subject to the restrictions and limitations of this Act.

Sec. 28a. Upon the organization of said commission and notification to the heads of all executive departments that the commission is ready to take up the work devolved upon it by this Act, all commissions and independent bureaus, by or in which payments for compensation are now provided, together with the adjustment and settlement of such claims, shall cease and determine, and such executive departments, commissions, and independent bureaus shall transfer all pending claims to said commission to be administered by it. The said commission may obtain, in all cases, in addition to the reports provided in section twenty-four, such information and such reports from employees of

the departments as may be agreed upon by the commission and the heads of the respective departments. All clerks now exclusively engaged in carrying on said work in the various executive departments, commissions, and independent bureaus, shall be transferred to, and become employees of, the commission at their present grades and salaries.

Sec. 29. That the commission, or any commissioner by authority of the commission shall have power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths, and to examine witnesses, upon any matter within the jurisdiction of the commission.

Sec. 30. That the commission shall have such assistants, clerks, and other employees as may be from time to time provided by Congress. They shall be appointed from lists of eligibles to be supplied by the Civil Service Commission, and in accordance with the civil service law.

Sec. 31. That the commission shall submit annually to the Secretary of the Treasury estimates of the appropriations necessary for the work of the commission.

Sec. 32. That the commission is authorized to make necessary rules and regulations for the enforcement of this Act, and shall decide all questions arising under this Act.

Sec. 33. That the commission shall make to Congress at the beginning of each regular session a report of its work for the preceding fiscal year, including a detailed statement of expenditures, a detailed statement showing receipts of and expenditures from the employees' compensation fund, and its recommendations for legislation.

Sec. 34. That for the fiscal year ending June thirtieth,

nineteen hundred and seventeen, there is hereby authorized to be appropriated, from any money in the Treasury not otherwise appropriated, the sum of $50,000 for the work of the commission, including salaries of the commissioners and of such assistants, clerks, and other employees as the commission may deem necessary, and for traveling expenses, expenses of medical examinations under sections twenty-one and twenty-two, reasonable traveling and other expenses and loss of wages payable to employees under section twenty-one, rent and equipment of offices, purchase of books, stationery, and other suppliers, printing and binding to be done at the Government Printing Office, and other necessary expenses.

Sec. 35. That there is hereby authorized to be appropriated from any money in the Treasury not otherwise appropriated, the sum of $500,000, to be set aside as a separate fund in the Treasury, to be known as the employees' compensation fund. To this fund there shall he added such sums as Congress may from time to time appropriate for the purpose. Such fund, including all additions that may be made to it, is hereby authorized to be permanently appropriated for the payment of compensation provided by this Act, including medical, surgical, and hospital services provided by section nine, and the transportation and burial expenses provided by sections nine and eleven. The Commission shall submit annually to the Secretary of the Treasury estimates of the appropriations necessary for the maintenance of the fund.

Sec. 36. The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided for in this Act. Compensation when awarded

shall be paid from the employees' compensation fund.

Sec. 37. That if the original claim for compensation has been made within the time specified in section twenty, the commission may, at any time, on its own motion or on application, review the award, and, in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, award compensation.

Sec. 38. That if any compensation is paid under a mistake of law or of fact, the commission shall immediately cancel any award under which such compensation has been paid and shall recover, as far as practicable, any amount which has been so paid. Any amount so recovered shall be placed to the credit of the employees' compensation fund.

Sec. 39. That whoever makes, in any affidavit required under section four or in any claim for compensation, any statement , knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $2000 , or by imprisonment for not more than one year, or by both such fine and imprisonment.

Sec. 40. That wherever used in this Act the singular includes the plural and the masculine includes the feminine.

The term "employee" includes all civil employees of the United States and of the Panama Railroad Company.

The term "commission" shall be taken to refer to the United States Employees' Compensation Commission provided for in section twenty eight.

The term "physician" includes surgeons.

The term "monthly pay" shall be taken to refer to the monthly pay at the time of the injury.

Sec. 41. That all Acts or parts of Acts inconsistent with this Act are hereby repealed: ***Provided however,*** That for injuries occurring prior to the passage of this Act compensation shall be paid under the law in force at

the time of the passage of this Act: *And provided further,* That if an injury or death for which compensation is payable under this Act is caused under circumstances creating, a legal liability in the Panama Railroad Company to pay damages therefor under the laws of any State, Territory, or possession of the United States or of the District of Columbia or of any foreign country, no compensation shall be payable until the person entitled to compensation releases to the Panama Railroad Company any right of action which he may have to enforce such liability of the Panama Railroad Company or until he assigns to the United States any right which he may have to share in any money or other property received in satisfaction of such liability of the Panama Railroad Company.

Sec. 42. That the President may, from time to time, transfer the administration of this Act so far as employees of the Panama Canal and of the Panama Railroad Company are concerned to the governor of the Panama Canal, and so far as employees of the Alaskan Engineering Commission are concerned to the chairman of that commission, in which cases the words "commission" and "its" wherever they appear in this Act shall, so far as necessary to give effect to such transfer, be read "governor of the Panama Canal" or "chairman of the Alaskan Engineering Commission," as the case may be, and "his"; and the expenses of medical examinations under sections twenty-one and twenty-two, and the reasonable traveling and other expenses and loss of wages payable under section twenty-one, shall be paid out of the appropriations of the Panama Canal or for the Alaskan Engineering Commission or out of funds of the Panama Railroad, as the case may be, instead of out of the appropriation for the work of the commission.

In the case of compensation to employees of the Panama Canal or Panama Railroad Company for temporary disability, either total or partial, the President

may authorize the governor of the Panama Canal to waive, at his discretion, the making of the claim required by section eighteen. In the case of alien employees of the Panama Canal or of the Panama Railroad Company, or of any class or classes of them, the President may remove or modify the minimum limit established by section six on the monthly compensation for disability and the minimum limit established by clause (K) of section ten on the monthly pay on which death compensation is to be computed. The President may authorize the governor of the Panama Canal and the chairman of the Alaskan Engineering Commission to pay the compensation provided by this Act, including the medical, surgical, and hospital services and supplies provided by section nine and the transportation and burial expenses provided by sections nine and eleven, out of the appropriations for the Panama Canal and for the Alaska Engineering Commission, such appropriations to be reimbursed for such payments by the transfer of funds from the employees' compensation fund.

Approved, September 7, 1916.

Appendix H

EXCERPT FROM P.L. 79-161, 59 STAT 503

79th CONG., 1st SESS.--CH. 328--JULY 28, 1945

[CHAPTER 328]

AN ACT

To amend the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 20 of the Act, entitled "An Act, to provide compensation employees of the United States suffering injuries while in the performance of their duties and for other purposes", as amended, is amended by adding at the end thereof the following new sentence:
"Failure to give notice of injury or to file claim for compensation for disability or death within the time limits and in the manner prescribed by this Act shall not bar the claim of any person thereunder if such claim is filed within five years after the injury or death and if the Commission shall find (1) that such failure was due to circumstances beyond the control of the person claiming

benefits, or (2) that such person has shown sufficient cause or reason in explanation thereof, and material prejudice to the interest of the United States has not resulted from such failure ; and upon such finding the Commission may waive compliance with the applicable provisions of this Act."

Sec. 2. That the first paragraph of section 10 of such Act is amended by striking therefrom the words. "within six years", and the words "subject to the modification that no compensation shall be paid where the death takes place more than one year after the cessation of the disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury;", and by deleting the comma and adding a colon following the word "pay" therein; and that section 11 of such Act is amended by striking therefrom the words "within six years", and the last sentence of such section.

Sec. 3. That subdivision (G) of section 10 of such Act is hereby amended by striking therefrom the words "for a period of eight years" and "before that time", and by substituting the word "until" for the word "unless" therein.

Sec. 4. That section 42 of such Act is hereby amended by adding at the end thereof the following new paragraph: "Whenever the Commission shall find that the amount of compensation, as provided by other provisions of this Act, payable to employees of the of the United States who are neither citizens or residents

of the United States, or any Territory, or Canada, or payable to any dependents of such employees, is substantially disproportionate to compensation for disability or death which may be payable in similar cases under local law, regulation, custom, or otherwise, at the place outside the United States , any Territory, or Canada, where such employees may be working at the time of injury, the Commission may provide for payment of compensation upon such basis as will be reasonably in accord with prevailing local payments in similar cases, (1)by adoption or adaptation of the substantive features (by a schedule or otherwise) of local workmen's compensation provisions, or other local law, regulation or custom applicable in cases of personal injury or death, or (2) by establishing and promulgating , for specific classes of employees, areas or places, special schedules of compensation for injury and death (including schedules for the loss or loss of use of members and functions of the body); and irrespective of the basis adopted may at any time modify or limit therein (a) the maximum monthly and total aggregate payments for injury and death (including modification and limitation of medical and other benefits), and (b) the percentages of the employee's wage payable as compensation for such injury or death, and to modify, limit, or redesignate the class or classes of beneficiaries entitled to death benefits, including the designation of persons, representatives, or groups, who would be entitled under local law or custom to payment on account of death, whether or not included in the classes of beneficiaries otherwise specified in this Act. In the cases of such noncitizens and nonresidents, the

Commission or its designees are authorized to make lump-sum awards (in the manner prescribed by section 14 of this Act), whenever the Commission or its authorized designees shall deem such settlement to be for the best interest of the United States , and also in any such cases to compromise and pay claims for any benefits so provided for, including claims in which there is a dispute as to the jurisdiction or other facts, or questions of law. Compensation so payable shall be in lieu of all other compensation from the United States for the same injury or death, and any payment so made shall for all purposes be considered as compensation under this Act and as satisfaction of all liability of the United States in respect to the particular injury or death. The Commission may delegate to any officer, agency or employee of the United States, with such limitations and right of review as it deems advisable, authority to process, adjudicate, commute by lump-sum award, compromise, and pay any claim or class of claims for compensation, and to provide other benefits, locally, under this paragraph, in accordance with such regulations and instructions as the Commission shall deem necessary, and for such purposes the Commission is authorized to provide or transfer funds (including reimbursement of amounts paid under this Act). Should the Commission find (1) that conditions prevent the establishment of facilities for processing and adjudicating claims of such noncitizens and nonresidents, or (2) that such noncitizens and nonresidents are alien enemies, the Commission may waive the application of this Act, in whole or in part, and for such period or periods of time as the Commission shall fix. The provisions of this

paragraph may be applied retroactively as the Commission may determine, and, where necessary, with such adjustment of compensation and benefits as the Commission may find to be proper. The action of the Commission or its designees in allowing or denying any payment under this Act shall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or by any court by mandamus or otherwise, and credit shall be allowed in the accounts of any certifying or disbursing officer for payments in accordance with this section. Whenever used in this section, the geographical reference to the United States shall mean the continental United States."

Sec. 5. (a) The amendments to such Act shall be applicable retroactively as follows:

(1) The amendment in section 1 of this Act shall apply to injury and death cases, whether or not reported or acted upon, where the injury (or injury causing death) occurred on or after December 7, 1940.

(2) The amendment in section 2 shall be applicable in any case
of death following injury where the injury occurred prior to the date of approval of this Act and the employee is receiving or is entitled to receive compensation for injury on or after such date.

(3) The amendment in section 3 shall be applicable in any case where a beneficiary, affected by the provisions of section 10 (G) of such Act, (a) is receiving compensation (or whose claim is in the process of initial adjudication) on the date of the approval of this Act, or

(b) whose compensation has been terminated by reason of the limitation provisions of such section 10 (G) within three years prior to the date of such approval, should be found by the Commission to be suffering hardship at the time of approval of this Act by reason of such termination.

(b.) In any case where an employee employed by the United States within the purview of such Act or any extension thereof suffers disability or death after capture, detention, or other restraint by an enemy of the United States, during the present war, such disability or death shall in the administration of such Act be deemed to have resulted from injury occurring while in the performance of duty, whether or not the employee was engaged in the course of his employment when taken by the enemy: *Provided,* That this subparagraph shall not apply in the case of any person (1) whose residence is at or in the vicinity of the place from whence he was thus taken, and (2) who was not living there solely by virtue of the exigencies of his employment, unless such person was so taken while he was engaged in the course of his employment; *Provided further,* That compensation for disability or death shall not be paid during any period of time during which the disabled person (or the dependents of such person, or any one of them) should receive or be entitled to receive any pay, other benefit, or gratuity from the United States on account of detention by the enemy or by reason of the same disability or death, unless such pay, benefit, or gratuity is refunded or renounced.

Approved July 28, 1945.

Appendix I

EXCERPT FROM CONGRESSIONAL RECORD, HOUSE JULY 19, 1945 AT PAGE 7815-7817

AMENDMENT OF FEDERAL EMPLOYEES COMPENSATION ACT

Mr. WALTER. Mr. Speaker, I ask unanimous consent for the immediate consideration of the bill (S. 714) to amend the act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes as amended".

The Clerk read the title of the bill.

The SPEAKER. Is there objection to the present consideration of the bill?

Mr. MICHNER. Mr. Speaker, reserving the right to object, as I understand, this is an emergency matter, financially at least. It passed the Senate and has had some committee consideration in the House. Will the gentleman explain the details of the bill and state the necessity of calling it up at this time?

Mr. WALTER. Mr. Speaker, this legislation is designed to amend the United States Employees Compensation Act so that those employees of the United States who were on Guam and in the Philippines and who were unable to file their claims within the time required under existing law will be able to file their claims.

Sections 2 and 3 are intended to relieve hardship in

individual cases. In certain cases of occupational disease or severe injury the injured employee may suffer prolonged disability before finally succumbing to the effects of such disease or injury. During this period his income is reduced to the level of disability-compensation payments, and if death occurs after a lapse of 6 years the dependents are denied compensation for the death and no provision is made for the payment of the expense of the burial. The amendment proposed in section 2 will permit payment of compensation and burial expense in all cases where death is a result of an injury otherwise within the purview of the law. Section 3 would permit the continuance of compensation after a period of 8 years to certain dependent persons without other means of support.

The fourth section has to do with the payment of compensation to employees of the United States in foreign countries. Under existing law it is necessary to pay these employees in accordance with the schedules in effect in this country, notwithstanding the fact that such payments are substantially disproportionate to compensation which may be payable in similar cases under local law at the place outside the United States where such employees may be working at the time of injury.

If this legislation is enacted into law it will enable the Compensation Commission to make the payments in accordance with the laws of the several countries in which work is being done and should result in a very large saving to the Government. It is anticipated this will eliminate friction and dissatisfactions met with where a standard of compensation by the United States may be higher than that which local authorities consider adequate for other local employees in a particular area.

Mr. GWYNNE of Iowa. Mr. Speaker, will the gentleman yield?

Mr. WALTER. I yield to the gentleman from Iowa.

Mr. GWYNNE of Iowa. As I understand, the last provision applies only to people who are not citizens or residents of this country?

Mr. WALTER. That is correct.

Mr. GWYNNE of Iowa. May I say that this bill his been before Subcommittee No. 3 and has been considered thoroughly.

Mr. SPRINGER. Mr. Speaker, will the gentleman yield?

Mr. WALTER. I yield to the gentleman from Indiana.

Mr. SPRINGER. The provisions of this bill, as I understand them, extend the statute of limitations from 1 year to 6 years for the purpose of filing claims of the character included in this legislation?

Mr. WALTER. Precisely. There are about 400 claims, and I may say to the gentleman from Indiana that unless this legislation is enacted the result will be the filing of many private bills. The necessity of doing that will be obviated it there is a general law to take care of these cases.

Mr. SPRINGER. As I understand it, the subcommittee of which the gentleman from Pennsylvania is chairman has given this measure consideration?

Mr. WALTER. Yes; It was considered and unanimously agreed to by the committee. It has passed the Senate on the Unanimous Consent Calendar.

Mr. SPRINGER. I thank the gentleman.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There being no objection, the Clerk read the bill, as follows:

Be it enacted, etc., That section 20 of the act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," as amended, is amended by adding at the end thereof the following new sentence:

"Failure to give notice of injury or to file claim for compensation

for disability or death within the time limits and in the manner prescribed by this Act shall not bar the claim of the person thereunder if such claim is filed within 5 years after the injury or death and if the Commission shall find (1) that such failure was due to circumstances beyond the control of the person claiming benefits, or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure; and upon such finding the Commission may waive compliance with the applicable provisions of this Act."

Sec. 2. That the first paragraph of section 10 of such Act is amended by striking therefrom the words "within 6 years", and the words "subject to the modification that no compensation shall be paid where the death takes place more than 1 year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than 1 year after the injury;", and by deleting the comma and adding a colon following the word "pay" therein and that section 11 of such Act is amended by striking therefrom the words "within 6 years", and the last sentence of such section.

Sec. 3. That subdivision (G) of section 10 of such Act is hereby amended by striking therefrom the words "for a period of 8 years" and "before that time", and by substituting the word "until" for the word "unless" therein.

Sec. 4. That section 42 of such Act is hereby amended by adding at the end thereof the following new paragraph:

"Whenever the Commission shall find that the amount of compensation as provided by other provisions of this Act, payable to employees of the United States who are neither citizens nor residents of the United States, any Territory, or Canada or payable to any dependents of such employees, is substantially disproportionate to compensation for disability or death which may be payable in similar cases under local law, regulation, custom, or otherwise, at the place outside the United States, any Territory, or Canada, where such employees may be working at the time of injury, the Commission may provide for payment of compensation upon such basis as will be reasonably in accord with prevailing local payments for similar cases, (1) by adoption or adaptation of the substantive features (by a schedule or otherwise) of local workmen's compensation provisions or other local law, regulation, or custom applicable in cases of personal injury or death, or (2) by establishing and promulgating for specific classes of employees, special schedules of compensation for injury and death (including schedules for the

loss or loss of use of members and functions of the body); and irrespective of the basis adopted may at any time modify or limit therein (a) the maximum monthly and total aggregate payments for injury and death (including modification and limitation of medical or other benefits), and (b) the percentages of the employee's wage payable as compensation for such injury or death, and to modify, limit, or redesignate the class or classes of beneficiaries entitled to death benefits, including the designation of persons, representatives, or groups, who would be entitled under local law or custom to payment on account of death, whether or not included in the classes of beneficiaries otherwise specified in this Act. In the cases of such noncitizens or nonresidents, the Commission or its designees are authorized to make lump-sum awards (in the manner prescribed by section 14 of this Act), whenever the Commission or its authorized designee shall deem such settlement to be for the best interest of the United States, and also in any such cases to compromise and pay claims for any benefits so provided for, including claims in which there is a dispute as to jurisdiction or other facts, or questions of law. Compensation so payable shall be in lieu of all other compensation from the United States for the same injury or death, and any payment so made shall for all purposes be considered as compensation under this Act and as satisfaction of all liability of the United States in respect to the particular injury or death. The Commission may delegate to any officer, agency, or employee of the United States, with such limitations and right of review as it deems advisable, authority to process, adjudicate, commute by lump-sum award, compromise, and pay any claim or class of claims for compensation, and to provide other benefits, locally, under this paragraph, in accordance with such regulations and instructions as the Commission shall deem necessary, and for such purpose the Commission is authorized to provide or transfer funds (including reimbursement of amounts paid under this Act). Should the Commission find (1) that conditions prevent the establishment of facilities for processing and adjudicating claims of such noncitizens and nonresidents, or (2) that such noncitizens and nonresidents are alien enemies, the Commission may waive the application of this Act, in whole or in part, and for such period or periods of time as the Commission shall fix. The provisions of this paragraph may be applied retroactively as the Commission may determine, and, where necessary, with such adjustment of compensation and benefits as the Commission may find to be proper. The action of the Commission or its designees in allowing or denying any payment under this Act shall be final and conclusive for all purposes and with respect to all

questions of law and fact, and not subject to review by any other official of the United States, or by any court by mandamus or otherwise, and credit shall be allowed in the accounts of any certifying or disbursing officer for payments in accordance with this section. Wherever used in this section, the geographical reference to the United States, shall mean the continental United States."

Sec. 5. (a) The amendments to such Act shall be applicable retroactively as follows:

(1) The amendment in section 1 of this Act shall apply to injury and death cases, whether or not reported or acted upon where the injury (or injury causing death) occurred on or after December 7, 1940.

(2) The amendment in section 2 shall be applicable in any case of death following injury where the injury occurred prior to the date of approval of this Act and the employee is receiving or is entitled to receive compensation for injury on or after such date.

(3) The amendment in section 3 shall be applicable in any case where a beneficiary affected by the provisions of section 10 (G) of such Act, (a) is receiving compensation (or whose claim is in the process of initial adjudication) on the date of the approval of this Act, or (b) whose compensation has been terminated by reason of the limitation provisions of such section 10 (G) within 3 years prior to the date of such approval, should be found by the Commission to be suffering hardship at the time of approval of this Act by reason of such termination.

(b.) In any case where an employee employed by the United States within the purview of such Act or any extension thereof suffers disability or death after capture, detention, or other restraint by an enemy of the United States, during the present war, such disability or death shall in the administration of such Act be deemed to have resulted from injury occurring while in the performance of duty, whether or not the employee was engaged in the course of his employment when taken by the enemy: Provided, That this subparagraph shall not apply in the case of any person (1) whose residence is at or in the vicinity of the place from which he was thus taken, and (2) who was not living there solely by virtue of the exigencies of his employment, unless such person was so taken while he was engaged in the course of his employment; Provided further, That compensation for disability or death shall not be paid during any period of time during which the disabled person (or the dependents of such person, or any one of them) should receive or be entitled to receive any pay, other benefit, or gratuity from the United States on account of detention by the enemy or by reason of

the same disability or death, unless such pay, benefit, or gratuity is, refunded or renounced.

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

Appendix J

EXCERPT FROM TITLE 5 U.S.C. § 8128

§ 8128. Review of award

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may--

(1) end, decrease, or increase the compensation previously awarded; or

(2)award compensation previously refused or discontinued.

(b)The action of the Secretary or his designee in allowing or denying a payment under this subchapter is--

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Credit shall be allowed in the accounts of a certifying or disbursing official for payments in accordance with that action.